STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

AUTOMOTIVE UNITED TRADES ORGANIZATION, a Washington nonprofit corporation, TOWER ENERGY GROUP, a California corporation, Plaintiffs, v. STATE OF WASHINGTON; and JIM MCINTYRE, WASHINGTON STATE TREASURER, Defendants.	NO. 10-2-43108-0 KNT DEFENDANT STATE OF WASHINGTON'S MOTION FOR SUMMARY JUDGMENT

RELIEF REQUESTED

Plaintiffs Automotive United Trades Organization and Tower Energy Group (hereinafter and collectively "AUTO") challenge the Hazardous Substance Tax enacted by Initiative 97. AUTO claims that the Tax violates article II, section 40 (Amendment 18) of the Washington Constitution. AUTO's claim should be dismissed. First, the case should be dismissed as time-barred under either the applicable statute of limitations or the doctrine of laches due to AUTO's over 22 year delay in filing suit. Furthermore, if the Court reaches the merits, the applicable law firmly establishes the constitutionality of the Hazardous Substance Tax. There are no disputed issues of material fact. As a result, Defendants State of

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Washington and Jim McIntyre (collectively "State") are entitled to judgment as a matter of law, and dismissal is appropriate.

STATEMENT OF FACTS

In 1988, voters approved Initiative 97. Initiative 97 created the Model Toxics Control Act (MTCA) that governs the investigation and clean up of contaminated properties within the state. Initiative 97 also created the current Hazardous Substance Tax to fund the implementation of MTCA (codified at RCW 82.21). Initiative 97 replaced a similar cleanup program and tax that was enacted by the legislature in October 1987.[1] *See* Laws of 1988, ch. 112. The current Tax has been on the books since 1988 and has never been challenged until now.

The Hazardous Substance Tax is imposed on the privilege of possession of a hazardous substance within the state. RCW 82.21.030(1). A hazardous substance is defined, in pertinent part, as:

> (a) Any substance that, on March 1, 2002, is a hazardous substance under section 101(14) of the federal comprehensive environmental response, compensation, and liability act of 1980 . . .
>
> (b) **Petroleum products**;
>
> (c) Any pesticide product required to be registered under section 136a of the federal insecticide, fungicide and rodenticide act . . . and;
>
> (d) Any other substance, category of substance, and any product or category of product determined by the director of ecology by rule to present a threat to human health or the environment if released into the environment. . . .

RCW 82.21.020(1) (emphasis added). The Tax is assessed on the first in-state possession of the hazardous substance at a rate of 0.7 percent multiplied by the wholesale value of the substance. RCW 82.21.030(1). Successive possession of a previously taxed substance is

[1] Like the current Hazardous Substance Tax, the prior tax also applied to petroleum and petroleum products, including motor vehicle fuels. *See* Laws of 1988, ch. 112, § 2(6)(f). On the 1988 ballot, the 1987 legislation ran alongside Initiative 97 as Alternative Measure 97B. *See* Declaration of Kelly Wood, ¶ 3, Ex. 1 (1988 Voter's Pamphlet).

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exempt. RCW 82.21.040(1).

Revenues from the Tax are deposited into two toxics control accounts to carry out the purposes of MTCA. RCW 82.21.030(2). Specifically, 0.33 percent of the 0.7 percent Tax (47.1 percent of the total revenue) is deposited in the State Toxics Control Account (State Toxics Account or State Toxics). Revenues from the State Toxics Account are used primarily to fund the State's response to hazardous substances, including clean up, management, regulation, and prevention. RCW 70.105D.070(2). Next, 0.37 percent (52.8 percent of the total) goes to the Local Toxics Control Account (Local Toxics Account or Local Toxics). These revenues are used to fund local government response to hazardous substances. RCW 70.105D.070(3). One percent of the revenues from each account is dedicated solely to fund public participation in cleanup projects and waste reduction campaigns. RCW 70.105D.070(5).

AUTO first challenged the Hazardous Substance Tax on March 23, 2010, in King County Superior Court, alleging that this practice, as applied to revenues from motor vehicle fuels, violates Amendment 18 of the Washington Constitution. Amendment 18 requires gasoline taxes to be used for highway purposes. It states, in pertinent part:

> [A]ll excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes. . . . *Provided*, That this section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes . . . .

Const. art. II, § 40 (amend. 18).

AUTO's original lawsuit was dismissed for lack of standing in November 2010. Declaration of Kelly Wood (Wood Decl.) ¶ 4, Ex. 2. In an effort to cure its standing defects and establish taxpayer standing for one of its members (Tower Energy Group), AUTO sent a letter to the Attorney General asking that he take action against the alleged constitutional violation. Wood Decl. ¶ 5, Ex. 3. On behalf of the Attorney General, Washington Solicitor

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General, Maureen Hart, declined AUTO's request, responding: "[a]fter reviewing your letter, the statute at issue, the 18th Amendment, and related cases, I cannot conclude that [a constitutional violation is] presented in this instance." Wood Decl. ¶ 6, Ex. 4. Specifically, Solicitor General Hart's analysis concluded that the Hazardous Substance Tax was not implicated by Amendment 18's enacting clause and also fell within its proviso. *Id.*

After adding Tower Energy Group as a co-plaintiff, AUTO re-filed its claims against the Hazardous Substance Tax in this Court. The State now moves to dismiss those claims as a matter of law.

STATEMENT OF THE ISSUES

1. Is AUTO's claim, filed 23 years after the Hazardous Substance Tax was enacted, filed within an unreasonable time under the Uniform Declaratory Judgments Act (UDJA) or otherwise barred by the Doctrine of Laches?

2. Does Amendment 18 require that Hazardous Substance Tax revenue applicable to motor vehicle fuel be deposited into the Motor Vehicle Fund when the Tax falls outside the plain scope of the Amendment, and the Amendment expressly grants broad authority for additional taxes on motor vehicle fuels when not levied primarily for highway purposes?

EVIDENCE RELIED UPON

The State relies upon the declarations and exhibits thereto of Jim Pendowski, James Dannenmiller, and Michael Feldcamp from the Department of Ecology. The State also relies upon the declaration of Kelly Wood, Assistant Attorney General, and exhibits thereto.

AUTHORITY AND ARGUMENT

I. LEGAL STANDARDS

A. Summary Judgment Standard.

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56. Summary judgment is designed to do away with unnecessary trials when there is no genuine issue of material fact.

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LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). "A material fact is one upon which the outcome of the litigation depends." *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

The burden is on the moving party to demonstrate there is no genuine issue of material fact and, as a matter of law, summary judgment is proper. *Jacobsen*, 89 Wn.2d at 108. If the moving party satisfies its burden, then the non-moving party must present evidence demonstrating material facts are in dispute. *Atherton Condo Ass'n v. Blume Dev. Co.,* 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The non-moving party must "set forth specific facts showing there is a genuine issue for trial." *LaPlante,* 85 Wn.2d at 158. A non-moving party may not oppose a motion of summary judgment by nakedly asserting there are unresolved factual questions. *Bates v. Grace United Meth. Church,* 12 Wn. App. 111, 115, 529 P.2d 466 (1974).

B. Burden For Establishing Unconstitutionality.

While the moving party must demonstrate that there are no genuine issues of material fact and that judgment as a matter of law is appropriate, this burden must be viewed in relation to the heavy burden AUTO faces in establishing that the Hazardous Substance Tax is unconstitutional. Statutes are presumed constitutional, and parties challenging constitutionality "'must demonstrate . . . unconstitutionality *beyond a reasonable doubt*.'" *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 808, 982 P.2d 611 (1999) (emphasis added) (citing *Belas v. Kiga*, 135 Wn.2d 913, 920, 959 P.2d 1037 (1998)). Furthermore, the legislature's powers in matters of taxation are unrestrained except where prohibited expressly or by fair inference. *Id*. at 808-09 (citations omitted). As a result, AUTO's burden is substantial, and any doubt as to whether the statutory scheme passes constitutional muster must be resolved in favor of the State.

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II. AUTO'S LAWSUIT IS TIME-BARRED BECAUSE AUTO FAILED TO FILE WITHIN A REASONABLE TIME UNDER THE UDJA AND/OR IS OTHERWISE BARRED BY THE DOCTRINE OF LACHES

As discussed in Section III below, the law applicable to this case firmly establishes that Amendment 18 does not require those Hazardous Substance Tax revenues derived from the first possession of motor vehicle fuels be deposited in the Motor Vehicle Fund and used for highway purposes. Mindful that courts seek to avoid deciding constitutional questions where cases may be fairly resolved on other grounds, *see Cmty. Telecable of Seattle, Inc. v. City of Seattle*, 164 Wn.2d 35, 41, 186 P.3d 1032 (2008), the State also points out that AUTO's lawsuit may be dismissed based upon the over two decades that AUTO delayed in bringing its present action.

A. AUTO's Lawsuit Was Not Filed Within A Reasonable Time.

AUTO's complaint seeks a judgment pursuant to Washington's UDJA, Chapter 7.24 RCW. Because the UDJA does not contain an explicit time period within which actions must be filed, actions for declaratory judgments must be brought within a "reasonable time." *Brutsche v. City of Kent*, 78 Wn. App. 370, 376-77, 898 P.2d 319 (1995) (citing *Federal Way v. King Cy.*, 62 Wn. App. 530, 815 P.2d 790 (1991)). In determining what constitutes a reasonable time, courts look by analogy to the time allowed for similar actions as prescribed by "'statute, rule of court, or other provision.'" *Id.* (quoting *Federal Way*, 62 Wn. App. at 536-37). For example, in a case seeking declaratory judgment that a special assessment was unconstitutional, the Court of Appeals found that one year constituted a reasonable time within which to challenge the assessment by likening the action to an action to recover a property tax, which is subject to a one year statute of limitations under RCW 84.68.060. *Cary v. Mason Cy.*, 132 Wn. App. 495, 504, 132 P.3d 157 (2006).

Unlike the plaintiff in *Cary*, AUTO does not assert that the challenged tax is invalid in this case. Rather, AUTO asserts that Hazardous Substance Tax revenues are misappropriated in that they are deposited into the toxics control accounts and used for preventing and

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remediating hazardous substance contamination rather than deposited into the Motor Vehicle Fund and used for highway purposes. AUTO's Complaint for Declaratory Relief at 4 (AUTO seeks a declaratory judgment that "the deposit of [Hazardous Substance Revenues] into the toxics control account is an unconstitutional diversion of such revenues from the MVF."). AUTO's complaint also specifically names the State Treasurer as the public officer in trust of those revenues. *Id*. Thus, the closest analogue in this case is the three year statute of limitations for actions that involve the misappropriation[2] of public funds in the custody of a public officer. *See* RCW 4.16.080(6).

By this measure, AUTO's current challenge comes far beyond the "reasonable time" required by the UDJA. The tax being challenged in this case has been on the books since 1988. Since that time, the law has been clear as to the substances covered by the Hazardous Substance Tax and where resulting revenues are deposited. *See* Chapter 82.21 RCW. At a minimum, AUTO therefore had constructive knowledge of its claim for over 22 years prior to filing its lawsuit against the tax. Additionally, during the 2010 legislative session, AUTO's president testified that he was aware of the tax when it passed in 1988 but chose not to challenge it then:[3]

> And now I want to end with a thing called the 18th Amendment … So why did we not have a challenge to [the Hazardous Substance Tax] before? Because we wanted an alternative to run alongside the environmental community's initiative 97. . . . So there was an agreement made. Some of us weren't all sober, but we made it. And we said, if we go forward, we'll accept this as the vote of the people, and we did, and no one has challenged [the Tax] to this day.

Wood Decl. ¶ 7, Ex. 5 at 5-6. Thus, AUTO also had *actual* knowledge of its claim but chose not to pursue it until now.

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[2] Indeed, to "misappropriate" is to apply to an illegal purpose. *Webster's Third New International Dictionary* 1442 (2002). The use of Hazardous Substance Tax revenue for allegedly illegal (i.e., non-highway) purposes is the very essence of AUTO's complaint.

[3] AUTO's president also testified that he negotiated an alternative to Initiative 97 that, ironically, also taxed petroleum products (including motor vehicle fuels) as hazardous substances. Wood Decl. ¶ 7, Ex. 5 at 3; Wood Decl. ¶ 3, Ex. 1 at 8, 32 (Alternative Measure 97B, § 45).

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It was unreasonable for AUTO to wait 22[4] years to challenge the Tax when it was intimately familiar with the Tax before it even passed. Furthermore, there is extreme prejudice to the State, as discussed immediately below. The lawsuit was not filed within a reasonable time under the UDJA and should be dismissed.

B. AUTO's Lawsuit Is Also Barred By The Doctrine Of Laches.

Laches is an equitable defense based on estoppel. *Davidson v. State*, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991). The defense is "an implied waiver arising from knowledge of existing conditions and acquiescence in them." *Buell v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972) (citing *Pierce v. King Cy.*, 62 Wn.2d 324, 382 P.2d 628 (1963)). It consists of two elements: (1) inexcusable delay; and (2) prejudice.[5] *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 241, 88 P.3d 375 (2004). The main component of the doctrine is the resulting prejudice and damage to the defendant. *Id.* The defendant has the burden of showing whether and to what extent prejudice has resulted because of the delay. *Clark Cy. Pub. Util. Dist. v. Wilkinson*, 139 Wn.2d 840, 849, 991 P.2d 1161 (2000).

Both elements of laches are met in this case. First, AUTO's delay in bringing suit is both long and inexcusable. As discussed above, the Hazardous Substance Tax was enacted nearly a quarter-century prior to AUTO's current challenge, and the full scope of the Tax has been evident throughout that time. Furthermore, evidence from AUTO's own founder and President establishes that AUTO was aware of the legal claims it ultimately brought against the Tax even before the Tax took effect in 1988; despite this knowledge, AUTO chose to acquiesce. Wood Decl., Ex. 1 at 5-6.

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[4] AUTO originally challenged the tax in 2010, 22 years after it was passed, but the first lawsuit was dismissed for lack of standing.

[5] Some older Supreme Court cases cite three elements of laches: (1) knowledge; (2) unreasonable delay; and (3) damage to the defendant. *See, e.g., Buell*, 80 Wn.2d at 522. The two-part test appears to collapse the first two elements of knowledge and unreasonable delay into one element of "inexcusable" delay.

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Next, the State is immensely prejudiced by the delay. To begin with, significant portions of the environmental programs built in reliance on Hazardous Substance Tax revenues deal directly with the legacy of petroleum products. At least 85 percent of the over 11,000 contaminated sites in Washington investigated and/or remediated with Hazardous Substance Tax funds are contaminated with some form of petroleum products, including motor vehicle fuels. Declaration of Michael Feldcamp (Feldcamp Decl.) ¶ 5. In fact, many of these sites are actually businesses of the type AUTO purports to represent. For example, and using a method that grossly underestimates the actual figure, at least 13 percent of all MTCA sites are associated with current or former retail gas stations. *Id.* ¶ 6.

In the decades following enactment of the Hazardous Substance Tax, and pursuant to the Initiative that established the Tax, the State has mounted a substantial response to contamination across the state, including contamination arising from motor vehicle fuels. Pursuant to the Initiative, 47.1 percent of the total Tax receipts are deposited into the State Toxics Account. *See* RCW 70.105D.070(2). Revenues from this account fund numerous programs by state agencies charged with cleaning up contaminated sites, improving hazardous waste management, and preventing future hazardous substance contamination.[6] Declaration of James Pendowski (Pendowski Decl.) ¶ 6, Ex. 1 at 6-47.

For example, the State Toxics Account funds 19-23 percent of Ecology's total operating budget. Declaration of James Dannenmiller (Dannenmiller Decl.) ¶ 6. The majority of the funds are used by Ecology's Toxics Cleanup and Hazardous Waste Programs to investigate and clean up contaminated sites, ensure permit compliance on existing sites, and provide technical assistance to businesses to avoid future contamination.[7] Pendowski Decl.

[6] While the Department of Ecology is the primary recipient, other agencies include, among others, State Patrol, Health, Puget Sound Partnership, Natural Resources, and Agriculture. Pendowski Decl., Ex. 1 at 32-47.

[7] Over the past 10 years, 59-71 percent of the Toxics Cleanup Program has been funded by the State Toxics Account. Dannenmiller Decl. ¶ 7. This program would be decimated if its primary source of funding is significantly depleted. *Id.* ¶ 8; Pendowski Decl. ¶ 5.

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¶¶ 3, 5. State Toxics funding is also used to wholly fund Ecology's program to respond to and clean up oil and hazardous materials spills. Dannenmiller Decl. ¶ 7. The Department of Agriculture uses State Toxics Account revenues to establish programs aimed at eliminating stockpiles of unusable pesticides and preventing future stockpiles from being created. Pendoswki Decl., Ex. 1 at 32-34. And, there are many other environmental functions of state government that are almost exclusively or partly funded by the State Toxics Account. *Id.* at 6-47

The remainder of Hazardous Substance Tax revenue, 52.8 percent, is allocated to the Local Toxics Account. *See* RCW 70.105D.070(3). These funds are provided to local governments to fund a wide range of activities related to hazardous substances, including cleanup actions, waste recycling and reduction programs, and removal of derelict or abandoned vessels. Pendowski Decl. ¶ 7. Some of the more significant cleanup actions funded by Local Toxics revenues include the clean up of the Lower Duwamish Waterway, the clean up of Bellingham Bay, the clean up of the Thea Foss waterway, and the clean up of the Ephrata landfill site. *Id*. ¶ 8. These cleanup actions are important not only because they protect human health and the environment, but also because they allow for the redevelopment and re-use of previously contaminated properties, thereby providing an economic boon to the surrounding communities. *Id.* ¶¶ 10-11.

As discussed below, Amendment 18 does not apply to the Hazardous Substance Tax. If AUTO prevails, however, funding for clean up and prevention of contamination—at both the state and local level—would be drastically reduced, especially cleanup of leaking motor vehicle fuels from underground storage tanks. *Id.* ¶ 5. The programs described above have been developed in reliance on the Hazardous Substance Tax as a source of funding, and the future viability of these programs depends on this source of continued funding. *Id.* ¶ 12. The State is therefore heavily prejudiced in that AUTO allowed 20 years of programs to be

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developed around, and pursuant to, the Hazardous Substance Tax prior to filing suit. Because of this delay and the resulting prejudice, AUTO's claim is also barred by laches.

III. THE HAZARDOUS SUBSTANCE TAX DOES NOT FALL WITHIN AMENDMENT 18'S LIMITATIONS AND, EVEN IF SO, AMENDMENT 18 EXPRESSLY GRANTS LEGISLATIVE AUTHORITY TO ENACT TAXES ON MOTOR VEHICLE FUEL NOT LEVIED FOR HIGHWAY PURPOSES

Adopted in 1944, Amendment 18 to Washington's Constitution provides, in pertinent part:

> All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington *on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes*, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes.
>
> …
>
> *Provided*, That *this section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes*, or apply to vehicle operator's license fees or any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax thereon, or fees for certificates of ownership of motor vehicles.

Const. art. II, § 40 (emphasis added).

Washington's Hazardous Substance Tax imposes a special excise tax on the "privilege of possess[ing]" hazardous substances (over 12,000 substances, including "petroleum products"[8]) within the state's boundaries in order to ameliorate and prevent harms caused by the presence of such substances in the state. *See* RCW 82.21.010, .030(1); RCW 70.105D.010(2); Feldcamp Decl. ¶ 7.

Because the Hazardous Substance Tax is a tax on the privilege of possessing hazardous substances, as opposed to a tax on the "sale, distribution, or use" of motor vehicle fuel, the Tax does not fall within the narrow scope of Amendment 18's restrictions. Furthermore, even if the Hazardous Substance Tax did fall within Amendment 18's enacting clause, the proviso to the Amendment grants the legislature express authority to impose additional taxes on motor

[8] "Petroleum products" include motor vehicle fuels such as gasoline and diesel. RCW 82.21.020(2).

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vehicle fuel for non-highway purposes. As a result, the State is entitled to judgment as a matter of law, and this Court should grant the State's motion to dismiss AUTO's claim.

A. The Plain Language And History Of Amendment 18 Establish That The Hazardous Substance Tax Does Not Fall Within The Scope Of The Amendment's Enacting Clause.

Where the language of an enactment is "plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation." *Heavey*, 138 Wn.2d at 809. However, the plain meaning of words in an enactment is not gleaned from those words alone but from all its terms and provisions in relation to the enactment's subject, nature, general object to be accomplished, and consequences resulting from construing the enactment in one way or another. *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007). Courts also look to the history surrounding the provision at the time of enactment in determining intent. *Northwest Motorcycle Ass'n v. State Interagency Comm. for Outdoor Recreation*, 127 Wn. App. 408, 414, 110 P.3d 1196 (2005) (citing *Westerman v. Cary*, 125 Wn.2d 277, 288, 892 P.2d 1067 (1994)).

In this case, the plain language and obvious import of Amendment 18, as supported by its context and history, establish that the Hazardous Substance Tax falls well outside the Amendment's enacting clause.

1. A plain reading of Amendment 18 places the Hazardous Substance Tax outside the scope of the enacting clause.

As noted above, Amendment 18 requires that motor vehicle license fees, excise taxes on the sale, distribution, or use of motor vehicle fuel, and other revenue intended to be used for highway purposes be placed into a special fund[9] and used exclusively for highway purposes. Const. art. II, § 40. Under a plain reading of this language, and understanding the words in their ordinary meaning, a tax on the privilege of possessing hazardous substances—levied

[9] As detailed below, the "special fund" referenced in Amendment 18 is the Motor Vehicle Fund (RCW 46.68.070), which actually pre-dates the adoption of Amendment 18. *See State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 55, 377 P.2d 466 (1962) (Donworth, J., dissenting).

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specifically to deal with the burdens posed by the presence of such substances in the state—is not a tax on the sale, distribution, or use of motor vehicle fuel intended to be used for highway purposes.

To begin with, the *activity* subject to the Hazardous Substance Tax is not the activity contemplated by Amendment 18. Amendment 18 applies to taxes placed on the "sale, distribution, or use" of motor vehicle fuel. Under a common-sense reading of the Amendment, taxes on this activity are reserved for highway purposes because the sale, distribution, and use of motor vehicle fuel directly impacts the need for building and maintaining roads. In other words, Amendment 18 is concerned with use because it is through use of motor vehicle fuels to propel vehicles on state roads that the burden sought to be alleviated arises (i.e., the need for maintenance and construction of roads inherent to motor vehicle fuel consumption). This specific focus on use is borne out by the numerous exceptions to Washington's gas tax (i.e., the Motor Vehicle Fuel Tax) for motor vehicle fuels that are not ultimately used to propel vehicles on the state's roadways. *See, e.g.,* RCW 82.36.020(2) (exempting from the gas tax motor vehicle fuel destined for export out of state); RCW 82.36.280 (providing refunds for non-highway use of motor vehicle fuel).

By contrast, the activity targeted by the Hazardous Substance Tax is the "privilege of possession." RCW 82.21.030(1). This is so because the Hazardous Substance Tax is concerned with the dangers and costs inherent in the mere presence of certain substances in the state. Thus, while the statute uses the *ability* to sell or use a hazardous substance as the metric for determining when possession occurs, the applicability of the Hazardous Substance Tax is untethered from *actual* sale or use. *See* RCW 82.21.020(3). Indeed, there is no question that one can be subject to the Hazardous Substance Tax while completely divorced from the actual sale, distribution, or use of target substances. *See id.*; *see also Tesoro Refining & Marketing Co. v. Dep't of Revenue*, 164 Wn.2d 310, 315-17, 190 P.3d 28 (2008) (no dispute that refinery gas capable of being captured and used is subject to the Hazardous Substance Tax even when

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discarded into the atmosphere 30 seconds after creation rather than captured and used). For example, and in contrast with the gas tax, motor vehicle fuel possessed in-state but destined for ultimate sale or use out-of-state is not exempt from the Hazardous Substance Tax. *See* WAC 458-20-252(4)(f) ("[t]here are no exemptions under the law for any possessions of hazardous substances in this state simply because such substances may later be sold or used outside this state."). Because mere "possession" is distinct from actual "sale, distribution, or use," the Hazardous Substance Tax falls outside of the plain language and obvious purpose of Amendment 18.

Next, Amendment 18's plain language teaches that the *purpose* of a tax has a bearing on the Amendment's application. Amendment 18's enacting clause specifically couches itself in terms of revenue "intended to be used for highway purposes. . . ." Const. art. II, § 40, cl. 1. More critically, and as discussed in greater detail below (in Section III.B), the proviso to Amendment 18 exempts from the enacting clause any "revenue from general or special taxes or excises *not levied primarily for highway purposes*. . . ." Const. art. II, § 40, cl. 2 (emphasis added). The myriad of exemptions to the gas tax (and refunds thereof) hammer this plain language home: it is not only the "sale, distribution, or use" of motor vehicle fuel that is subject to Amendment 18, it is the "sale, distribution, or use" of such fuel *for highway purposes*.[10] By its plain terms then, and at a minimum, Amendment 18 contemplates that there may be taxes on motor vehicle fuels that are not intended for highway purposes. *See id*. Taken together, these provisions unambiguously establish that, when it comes to Amendment 18, purpose matters.

As identified above, the purpose underlying the Hazardous Substance Tax is dealing with and preventing harms occasioned by the hazardous properties of certain materials,

[10] For example, motor vehicle fuel that is not used in conjunction with motor vehicles "licensed to be operated over and along any of the public highways" is not subject to the gas tax. RCW 82.36.280 (providing refunds for taxes paid on such fuel). Such fuel has *always* been exempted from the gas tax, even prior to enactment of Amendment 18. *See* Laws of 1933, ch. 58, § 18.

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including "petroleum products." Because this purpose is distinct from the need for maintenance and construction of roads and highways, the Hazardous Substance Tax falls outside the scope of Amendment 18 and, therefore, does not require deposit of Hazardous Substance Tax funds into the Motor Vehicle Fund for highway purposes.

Finally, the *subject* of the Hazardous Substance Tax also places it outside the scope of Amendment 18. Amendment 18 applies to excise taxes on "motor vehicle fuel." However, the Hazardous Substance Tax is significantly broader than Amendment 18's limited language. As noted, the Hazardous Substance tax attaches to the possession of over 12,000 substances, including "petroleum products" (of which gasoline and other fuels are a further subset).[11] Feldcamp Decl. ¶ 7. Under a plain reading of Amendment 18, a tax aimed at possession of any one of the entire spectrum of hazardous substances is not a tax aimed at "motor vehicle fuel."

In sum, the most natural, non-forced reading of Amendment 18 is that it prevents the diversion of excise taxes aimed at motor vehicle fuel and levied because of the burden placed on the highway system by the use of such fuels. Because the Hazardous Substance Tax is a tax on the activity of possessing any one of over 12,000 substances, and enacted for the purpose of dealing with the hazardous properties of such substances, the Tax falls outside of the plain scope of Amendment 18's enacting clause.

2. The context and background of Amendment 18 shows that it was narrowly crafted only to prevent diversion of the "gas tax" and other charges levied specifically for highway purposes.

The context surrounding Amendment 18's adoption in 1944 amply supports the conclusion that the Hazardous Substance Tax does not fall under the plain and natural meaning of the Amendment as would have been understood by its framers and voters.[12] In fact, when

[11] By volume, petroleum products constitute the largest category of hazardous substances present in the state and, thus, constitute the largest category of substances subject to the Hazardous Substance Tax. However, contamination from these products is present at the vast majority (85 percent) of the state's MTCA sites. Feldcamp Decl. ¶ 5.

[12] As noted above, the context and history surrounding the enactment of a provision are helpful in determining its plain meaning and intent. *Burns*, 161 Wn.2d at 146; *Northwest Motorcycle Ass'n*, 127 Wn. App.

viewed in context, it becomes apparent that Amendment 18 was enacted exclusively to prevent diversion of the *existing* Motor Vehicle Fuel Tax and other revenue specifically intended for highway purposes, not that it was intended to forever prohibit all other taxation of motor vehicle fuels.

To begin with, and similar to today, the "gas tax" was a very specific and identifiable item in 1944: the Motor Vehicle Fuel Tax. This tax was first imposed in 1921, more than two decades before the adoption of Amendment 18.[13] By the time of Amendment 18's enactment, the tax was imposed at a rate of five cents per gallon on motor vehicle fuel "sold, distributed, or used" in the state. Laws of 1921, ch. 173, § 2; Laws of 1933, ch. 58, § 5. Revenues from the gas tax were, and have always been, deposited into the Motor Vehicle Fund. *See* Laws of 1921, ch. 173, § 5; RCW 82.36.410. Although often erroneously cited as being created by Amendment 18, the legislature established the Motor Vehicle Fund as a permanent fund contemporaneously with the gas tax in 1921. Laws of 1921, ch. 96, § 18. From its inception, Motor Vehicle Fund expenditures (and, thus, the gas tax) were restricted to highway and road construction purposes. *See id*.

There should be little doubt that Amendment 18's application to "excise taxes . . . on the sale, distribution or use of motor vehicle fuel" refers, quite specifically, to the gas tax. In 1944, the Motor Vehicle Fuel Tax was an excise tax imposed on the sale, distribution, or use of motor vehicle fuels. Laws of 1933, ch. 58, § 5. Thus, it is no mere coincidence that Amendment 18 was aimed precisely at excise taxes imposed on the "sale, distribution, or use" of such fuels.

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at 414. To the extent the Court finds Amendment 18's provisions ambiguous, resort to all aids of statutory construction, including legislative history, is appropriate. *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

[13] Before 1920, road construction was paid for by property taxes; however, the explosion of vehicle ownership meant that existing property taxes could no longer pay for the increased need for roads. Chad D. Emerson, *All Sprawled Out: How the Federal Regulatory System Has Driven Unsustainable Growth*, 75 Tenn. L. Rev. 411, 438 (2008). Instead of dramatically raising property taxes, states created a new type of user tax—the gas tax (i.e., a tax on every gallon of fuel used to propel vehicles)—to meet the increased fiscal demand. *Id.*

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Next, voters in 1944 had specific reasons to be concerned with the use of gas tax revenues. Despite the statutory restriction on the use of Motor Vehicle Fund revenues, the legislature began diverting funds from the account (and thus the gas tax) to non-highway purposes in the 1930s and early 1940s. *See, e.g.*, Laws of 1933, ch. 192, § 2 (appropriating $5,566,966 from the Motor Vehicle Fund to various Washington educational facilities, including the University of Washington). In fact, the Voters' Pamphlet for Amendment 18 decried that "[b]etween 1933 and 1943 in this state, in excess of $10,000,000 of *your gas tax money* was diverted away from street and highway improvement and maintenance for other uses." Wood Decl. ¶ 8, Ex. 6 at 47 (emphasis added).

Adding to this concern, Congress passed the Hayden-Cartwright Act in 1934, eliminating federal funding for road projects to states using their gas tax revenues for non-highway purposes. 23 U.S.C. § 126(a) (1964); *see also* Chad D. Emerson, *All Sprawled Out: How the Federal Regulatory System Has Driven Unsustainable Growth*, 75 Tenn. L. Rev. 411, 439 (2008). Importantly, the Act did not require states to sweep in all possible taxation on motor vehicle fuels.[14] 23 U.S.C. § 126(a) (1964). However, Hayden-Cartwright proved a powerful incentive for states to lock-in their *existing* gas taxes. Within a few years of Hayden-Cartwright, 20 states, including Washington, adopted so-called "anti-diversion" amendments to their constitutions. Owen D. Gutfreund, *Twentieth-Century Sprawl: Highways and the Reshaping of the American Landscape* 32-33 (2004).

Given Hayden-Cartwright and the legislature's prior diversions, the predominant concerns regarding the gas tax in 1944 were that: (1) the tax was being diverted for purposes other than those for which it was enacted, and (2) such diversions seriously imperiled

[14] Hayden-Cartwright provided that: "Federal aid for highway construction shall be extended only to those states that use at least the amounts provided by law on June 18, 1934, for such purposes in each State from State motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators of all kinds for the construction, improvement, and maintenance of highways. . . ." 23 U.S.C. § 126(a) (1964). The fact that Hayden-Cartwright only required the preservation of existing gas taxes also lends support to the conclusion that Amendment 18 was enacted to do precisely that.

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Washington's receipt of federal highway dollars. As a result, the natural and most obvious import of Amendment 18, as would have been understood by the framers and voters at the time, is that the Amendment was aimed specifically to preserve the gas tax and other revenue intended for highway use.

As discussed below (in Section III.B), it should be beyond dispute that the Hazardous Substance Tax is not a gas tax. The gas tax has always been a tax levied on each gallon of fuel used to propel vehicles on state roads and has always been targeted at the need for roads that arises from such use. It should therefore be equally obvious that the Hazardous Substance Tax does not fall within the concerns addressed by Amendment 18. At a minimum, the history of Amendment 18 places considerable doubt on a broad interpretation of the enacting clause. Such doubts must be resolved in favor of constitutionality. *See Heavey*, 138 Wn.2d at 808.

B. Amendment 18 Expressly Grants The Legislature Broad Authority To Enact Other Taxes On Motor Vehicle Fuels Not Levied For Highway Purposes.

Even if this Court agrees with AUTO's expansive assertion that Amendment 18's enacting clause sweeps in *all* taxes touching upon motor vehicle fuels, regardless of target, purpose, or history, the proviso to the Amendment grants the legislature authority to enact additional taxes on motor vehicle fuels when not levied for highway purposes. Because the Hazardous Substance Tax falls squarely within the proviso, AUTO's claims still fail and summary judgment for the State is proper.

1. If subject to Amendment 18's enacting clause, the Hazardous Substance Tax is a special tax "not levied for highway purposes" exempted by the proviso.

By its plain terms, the proviso to Amendment 18 exempts certain revenue from the enacting clause, including "revenue from general or special taxes or excises not levied primarily for highway purposes…." Const. art. II, § 40, cl. 2. While the proviso does not operate as a substantive enactment itself, such that revenues encompassed by the proviso cannot be deposited in the Motor Vehicle Fund, the proviso "place[s] exceptions outside of the

preceding enacting clause" such that their deposit into the Motor Vehicle Fund is not required. *Heavey*, 138 Wn.2d at 812-13.

The Hazardous Substance Tax is a special excise tax that is not levied primarily for highway purposes. *See generally* Chapter 82.21 RCW. Thus, the Hazardous Substance Tax falls squarely within the plain and unambiguous language of the proviso, and deposit into the Motor Vehicle Fund is not required.

Although case law on the proviso is scarce, a 2001 Attorney General Opinion also supports the conclusion that the Hazardous Substance Tax falls within the proviso.[15] That Opinion, AGO 2001 No. 2,[16] examined a proposal to extend the sales tax to motor vehicle fuel. The Opinion concluded that, while the proviso would not permit the legislature from diverting the gas tax by legislative slight-of-hand, "[t]he proviso was an equally important part of [Amendment 18]."[17] AGO 2001 No. 2, at 5. As such, the Opinion concluded that any proper interpretation of Amendment 18 "must give meaning to both the enacting clause and the proviso." *Id*. at 6. Because the purpose of Amendment 18 was to prevent diversion of the gas tax, the Opinion framed the question under the proviso as focusing on whether the tax in question constitutes a "gas tax" as the framers of the Amendment and voters would have understood it in its natural meaning. *Id*. at 6-7.

As noted above, the gas tax in Washington has always been the Motor Vehicle Fuel Tax, a volume-based tax placed on the sale, distribution, or use of motor vehicle fuel and levied for the purpose of paying for and maintaining roads. The 2001 AGO focused upon the

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[15] "Although not controlling, attorney general opinions are entitled to great weight." *Thurston Cy. ex rel. Bd. of Cy. Comm'rs v. City of Olympia*, 151 Wn.2d 171, 177, 86 P.3d 151 (2004).

[16] For convenience, a copy of AGO 2001 No. 2 is attached. *See* Wood Decl. ¶ 9, Ex. 7.

[17] In reaching this conclusion, the Opinion noted, *inter alia*, that: "[i]n 1934, 1935, 1937, and 1941, Joint Resolutions were introduced . . . to enact a constitutional amendment to prevent the diversion of funds from highways. None of these proposed constitutional amendments contained a proviso limiting the scope of the requirement that certain taxes be used for highway purposes. None of these proposed amendments was even brought up for a vote by the House or Senate when they were introduced. On the other hand, when House Joint Resolution 4, which became Amendment 18, was introduced in 1943 *with the proviso*, it passed easily." AGO 2001 No. 2 at 6 (citations omitted) (emphasis added).

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volume-based nature of the gas tax, finding that "the chief distinguishing characteristic of a gas tax, as understood at the time Amendment 18 was enacted, is that it is a tax measured by the volume of the gas as opposed to its value."[18] *Id*. at 7. Under this measure, the Hazardous Substance Tax is not a gas tax because it is levied based upon the wholesale value of target substances. *See* RCW 82.21.030(1).

In addition to the distinction between volume-based and value-based taxes, there is an even more fundamental metric that takes into account the proviso's express use of the language "not levied primarily for highway purposes." Specifically, the use of this language in the proviso (and the enacting clause) makes clear that the *purpose* of a tax is crucial in determining whether a tax falls within the natural meaning of a "gas tax." Thus, the defining characteristic of a gas tax is that it is a tax levied upon motor vehicle fuel specifically for highway purposes. This has always been the case with Washington's gas tax, at the time of its enactment in 1921, at the time of Amendment 18's adoption in 1944, and continuing today. In contrast, the Hazardous Substance Tax is, and has always been, levied only at the hazardous properties of a large swath of substances, including motor vehicle fuels.

The Hazardous Substance Tax is a special excise tax that was not enacted primarily for highway purposes. Additionally, the Hazardous Substance Tax does not constitute an attempt to re-enact the gas tax under another guise. Thus, the Hazardous Substance Tax falls under the plain and unambiguous language of the proviso, and revenues from the Tax are not required to be deposited into the Motor Vehicle Fund.[19]

[18] The Opinion ultimately concluded that it would not violate Amendment 18 to extend the state sales tax to motor vehicle fuel and use the resulting revenues for non-highway purposes. AGO 2001 No. 2, at 8.

[19] Although the State does not comment on the propriety of dedicated funds, such funds, and in particular *constitutionally* dedicated funds, have been criticized as "unwise fiscal policy." *Heavey*, 138 Wn.2d at 814 (Talmadge, J., concurring). As such, the taxing flexibility inherent in Amendment 18 is appropriately viewed as a common-sense approach that preserved an existing funding source for highway purposes while allowing *additional* taxes on motor vehicle fuel for other purposes.

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2. The proviso was not intended only to preserve certain taxes existing at the time of enactment.

The State anticipates AUTO will assert that Amendment 18's proviso was intended merely to preserve those taxes existing at the time of the Amendment's adoption. As discussed above, such an interpretation cuts against the plain, unambiguous text of the proviso. Also, this argument is wholly undercut by an examination of taxes in effect at the time the Amendment was adopted.

Only three taxes possibly fell within Amendment 18's enacting clause at the time of its adoption in 1944.[20] AGO 2001 No. 2; Wood Decl. ¶ 10. The first was the gas tax, imposed at the rate of five cents per gallon on all motor vehicle fuel sold, distributed, or used in-state. *See* Laws of 1941, ch. 127, § 3. Next was what has since become know as the motor vehicle excise tax (MVET), a tax on the privilege of using motor vehicles. *See* Laws of 1937, ch. 228, § 2. Finally was the state's business and occupation (B&O) tax, a tax imposed on the privilege of engaging in certain business activities, which includes (among numerous other categories) retail and wholesale sales of motor vehicle fuels.[21] *See* Laws of 1935, ch. 180, § 211. The gas tax itself, as the specific target of Amendment 18's enacting clause, is obviously not exempted by the proviso. This leaves only the MVET and the B&O tax.

As recognized by the Supreme Court in *Heavey*, there is little question that Amendment 18's reference in the proviso to "'any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax'" refers "quite specifically" to the MVET. *See*

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[20] Arguably, a fourth tax was the "use fuel tax," a tax enacted in 1941 and covering all fuels *aside from motor vehicle fuel* used to propel internal combustion engines for use on roadways. *See* Laws of 1941, ch. 127. The use fuel tax was repealed in 1971 and re-enacted as the special fuel tax act (Chapter 82.38 RCW). *See* Laws of 1971, 1st Ex. Sess., ch. 175. However, because Amendment 18 applies expressly to "motor vehicle fuel" and the use fuel tax expressly did not apply to "motor vehicle fuel," Amendment 18 most likely did not apply to the use fuel tax in 1944 and does not apply to the special fuel tax now.

[21] More specifically, the B&O tax is "an excise tax imposed upon the act or privilege of engaging in business activities, for which the taxing authority provides services, measured by the application of a legislatively set rate against a valuation of the operation of the business, established by some standard such as gross revenues, gross sales, gross income, or the valuation of products." *City of Seattle v. Paschen Contractors, Inc.*, 111 Wn.2d 54, 57, 758 P.2d 975 (1988).

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Heavey, 138 Wn.2d at 807 n.2. The *Heavey* court also recognized the folly of attempting to place the MVET within both the general exemptions contained in the first part of the proviso and the specific exemption that follows. *See id*. As a result, of the three taxes in place in 1944, and possibly falling within the reach of the enacting clause, only the B&O tax is unaccounted for by the enacting clause or the specific exemption in the latter part of the proviso.

While the portion of the B&O tax applied to sales of motor vehicle fuel arguably falls within Amendment 18's enacting clause, it is a *general* tax not levied for highway purposes falling within the broad exemptions in the first portion of the proviso.[22] Because the B&O tax is a general tax, and because there were no special taxes on motor vehicle fuels in 1944 (aside from the gas tax itself), the only reasonable conclusion to be drawn from Amendment 18's exemption of "general *or special* taxes or excises" is that, at a minimum, the framers contemplated some future special taxes that would otherwise fall within Amendment 18's restrictions but were to be exempted because they were not enacted for highway purposes.[23] A reading that interprets the proviso as merely preserving the MVET and the B&O tax would: (1) improperly render the proviso's reference to special taxes completely meaningless, (2) ignore the express language of the proviso, and (3) constitute exactly the sort of "subtle and forced construction" of Amendment 18 that courts seek to avoid. *See id.* at 811 (quoting *O'Connell*, 75 Wn.2d at 558).

[22] To the best of the State's knowledge, the B&O tax has never been deposited in the Motor Vehicle Fund, either before or after adoption of Amendment 18.

[23] As is evident by the proviso's targeted exemption of the MVET, the framers of Amendment 18 understood how to narrowly identify an existing tax for preservation. *See* Const. art. II, § 40, cl. 2. Had the framers of Amendment 18 intended to limit the proviso's exemptions to the MVET and the B&O tax, they clearly could have done so.

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C. This Court Should Be Skeptical Of AUTO's Claim That The State Has Been Violating Amendment 18 For More Than Two Decades.

The Washington Supreme Court has repeatedly stated that courts should give great weight to legislative interpretations extending over long periods of time. *Northshore Sch. Dist. 417 v. Kinnear*, 84 Wn.2d 685, 727, 530 P.2d 178 (1975), *overruled on other grounds by Seattle Sch. Dist. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978); *State ex rel. Todd v. Yelle*, 7 Wn.2d 443, 456-57, 110 P.2d 162 (1941). In the specific context of Amendment 18, the *Heavey* court also expressed thinly-veiled skepticism with respect to an assertion that the legislature had been violating Amendment 18 for an extended timeframe by depositing MVET revenues into the Motor Vehicle Fund. *See Heavy*, 138 Wn.2d at 807-08.

These principles apply with force in this case. The current Hazardous Substance Tax was adopted in 1988 as part of Initiative Measure No. 97. *See* Laws of 1989, ch. 2. Initiative 97 was an alternative to, and replaced, the State's existing hazardous waste law that was enacted by the legislature in 1987. *See* Laws of 1987, 3rd Ex. Sess., ch. 2. Like Initiative 97, the 1987 legislation placed a tax on hazardous substances, including petroleum products. *Id*. §§ 44-48. Thus, the Hazardous Substance Tax has been in place in Washington since October 1987, over 23 years. As in *Heavey*, this Court should be skeptical of a claim that the State has been defying the constitution for almost a quarter-century. Additionally, the fact that the Hazardous Substance Tax has long been interpreted as not falling under Amendment 18's anti-diversionary requirements should carry heavy weight.

IV. CONCLUSION

AUTO's more than two decade delay in filing its challenge establishes that the claim was not brought within a reasonable time; the claim is thus barred by analogous statutory limits and/or the doctrine of laches. Even if AUTO's claim is timely, however, the Hazardous Substance Tax is not implicated by Amendment 18. A tax on the privilege of possessing any one of many thousands of hazardous substances—for the purpose of dealing with problems

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caused by such substances—is not a tax on the sale, distribution, or use of motor vehicle fuel for highway purposes as would have been understood by the framers and voters of Amendment 18. Furthermore, the Amendment's proviso plainly authorizes the legislature (or in this case, the voters) to enact additional taxes on motor vehicle fuels for purposes other than highway purposes. As such, the State is entitled to judgment as a matter of law and respectfully requests that the Court grant its motion to dismiss AUTO's claim.

DATED this 9th day of March, 2011.

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